APPEAL NO. 92118

On February 18, 1992 a contested case hearing was held in _____, Texas, with (hearing officer) presiding. (Hearing officer) determined that the claimant, the appellant herein, did not sustain a compensable injury on May 29, 1991 in the course and scope of his employment with (employer) while moving an air conditioning unit. Appellant claimed that an injury to his back, and a hernia, occurred on that date.

The appellant asks that the decision be reviewed and reversed. Specifically, the appellant complains either that there is no evidence, or insufficient evidence, to support the hearing officer's Findings of Fact Nos. 5, 6, 12, and 13 and Conclusions of Law Nos. 4 and 5. In summary, these relate to the hearing officer's determination that appellant's pain on May 29th was caused by a nonwork-related herpes outbreak, and that he did not incur a compensable back and hernia injury by lifting an air conditioner. Appellant argues that the respondent was not able to prove that an injury did not occur on May 29th, or that his pain resulted only from herpes. As part of his appeal against Finding of Fact No. 6 relating to a diagnosis of herpes zoster made by a health care provider, appellant argues that the diagnosis was signed by a licensed vocational nurse and should be given less weight than the statements of appellant's two doctors. Finally, appellant argues that he sought compensation for a back and hernia injury but the entire defense of the carrier was based upon controverting herpes zoster, for which appellant had not filed a claim.

DECISION

Finding no error in the findings and conclusions of the hearing officer, we affirm his decision.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A court of appeals in reviewing and analyzing a "no evidence" point of error should and must consider only the evidence and reasonable inferences therefrom that support the trier of fact, and disregard inferences and evidence that are adverse to the determination. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, no writ). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Youngblood, *supra*. We do not substitute our judgment for that of the hearing officer when, as here, his findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The decision of the hearing officer will be set aside only if the evidence supporting

the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The respondent correctly points out that it is not the carrier's burden to prove that an injury did not occur. The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred within the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621, 625 (Tex. Civ. App.-Amarillo 1980, no writ). A claimant must link the contended physical injury to an event at the workplace, and the trier of fact may chose to reconcile conflicting evidence about the injury against the claimant. Johnson v. Employers' Reinsurance Corp. , 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Any conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ).

The only issue at the hearing was whether the appellant suffered an injury on May 29, 1991 in the course and scope of his employment. A brief recitation of the facts is in order. Appellant claimed that he was injured when moving an air conditioning unit at an apartment complex from the roof to the apartment. He lifted the unit with one other person, identified as the manager, after protesting that the unit would be too heavy. He stated that four men usually were needed to lift each unit. He stated that when he lifted the unit, he felt pain in his left back, side, and groin area. Testimony from appellant was not clear on whether he specifically informed his employer or complained about the fact he was injured. Appellant's testimony was basically that the manager "knew" from the beginning he was hurt. Appellant stated that he felt a burning sensation that night and noticed "a ball" in his groin the next day. He went to (Clinic 1) on June 5th where he testified he saw a Dr. W. A medical clinic form, signed by Ms. S, LVN, notes a diagnosis then of "herpes zoster-not work related." The appellant went to (Clinic 2) on June 7th; the clinic's extensive notes, reflecting examination by Dr. H, indicate that appellant said he noticed a ball in his groin while lifting an air conditioner, and that he identified his area of pain. No hernia was detected in the groin, although swollen glands were. The diagnosis was that a herpes outbreak was observed from the left side back to left groin area. Medication was prescribed to treat the herpes.

Appellant went to Dr. G on June 12th. Dr. G's letter report, dated July 2nd, indicates detection of a lumbar petit triangular hernia. The report notes that x-rays of the lumbar sacral spine are normal. Dr. G referred appellant to Dr. A who concurred in the diagnosis of lumbar hernia. Dr. A further noted that no inguinal hernia was found in the groin. The report also noted a strain to the spine. Appellant ultimately had surgery for the hernia on July 17th and testified that the surgery had resolved the "ball." The record indicates that Dr. G pronounced appellant to be totally incapacitated as late as November 12, 1991.

The respondent noted that an ordered appointment with a doctor of its choice, Dr. D, scheduled for July 15th, had not been kept. Appellant replied that he had been going through a presurgical procedure at the hospital that day, which he went to because Dr. G felt that a prompt operation was needed.

The benefit review conference report makes clear that the respondent understood that the claim was made for a back and hernia injury, not for herpes.

There is evidence on both sides of the issue. However, we would note that the report of Dr. H indicates that he did not find a hernia on July 7th, although the area of pain and specific accident claimed were described to him. The hearing officer took official notice of the definition of herpes zoster as set out in the 27th Edition of Dorland's Illustrated Medical Dictionary. This definition indicates that pain such as that experienced by appellant on and around May 29th can be caused by herpes. The hearing officer, therefore, apparently believed that the occurrence on May 29th was not established as the cause of the hernia detected for the first time on June 12th. (Although the Clinic 1 report in evidence was signed by a LVN, the appellant testified that he saw a doctor at the clinic, and there is no indication that it was the LVN who "diagnosed" herpes.) We would further note that there is scant medical evidence of an injury to the back or spine.

Taken as a whole, the record contains probative evidence supporting the appealed findings and conclusions of the hearing officer. His decision is therefore affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge